No. 76-1171

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES Y. CARTER, Public Vehicle License Commissioner of the City of Chicago,

Petitioner,

vs.

LUTHER MILLER, on his own behalf and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

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ISSUES PRESENTED

1. Whether an ordinance which precludes from consideration for licensure during his entire lifetime a person once convicted of an offense involving the use of a deadly weapon, but which provides for the continuing licensure of present licensees recently convicted of the same offense, and of other applicants or licensees convicted of equally or more serious or more job-related offenses, violates respondent's rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether an ordinance which irrebuttably and permanently presumes that an applicant is unfit for licensure because he was once convicted of an offense violates respondent's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Luther Miller is an ex-offender. As a young man in 1965, he was convicted of armed robbery. After serving seven years in prison, he was released on parole in February, 1972, and, 18 months thereafter, having complied with all its terms and conditions, was unconditionally discharged.

In September, 1974, Miller tried to apply for a Chicago public chauffeur's license as a preliminary step to seeking private employment as a taxi-cab, transit or ambulance driver. However, upon informing an agent of the Public Vehicle License Commission that he had once been convicted of armed robbery, his application was denied. The agent relied upon the licensing ordinance at issue here, writing: "Anyone convicted of armed robbery may not apply." (App., at 10). Thereafter, Luther Miller filed suit in district court to vindicate his rights as guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

1. The Ordinance

Chapter 28.1-2 of the Municipal Code of the City of Chicago (hereinafter "Code") makes a public chauffeur's license a prerequisite for any person wishing to be employed "transporting . . . passengers for hire." Included within its ambit are persons who wish to drive a bus or rapid transit, a taxi-cab, or an ambulance (Code, Ch.103-12) in the City of Chicago. All applications for the license are made to the defendant Commissioner. (Ch.28.1-3). The Commissioner may require from the applicant any information pertaining to his "character, reputation, physical qualifications, past employment and conduct" deemed relevant to qualification for a chauffeur's license. In addition, the applicant must be in good physical health and "not be addicted to the use of drugs or intoxicating liquors." (Ch.28.1-3).

The Commissioner submits the name of the applicant to the captain of the police district in which the applicant

resides, for an investigation into the "character and reputation" of the applicant. (Ch.28.1-4). In order to aid the police investigation, the applicant's fingerprints and photograph are submitted to the commissioner of police. The police then submit their report to Carter, who approves or disapproves the application:

> If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. Ch.28.1-4.

Thus, the ordinance grants the Public Vehicle License Commissioner broad investigative power before final approval of any license applicant for a chauffeur's license, as well as discretion in determining whether the applicant is a "suitable" person for licensure.

No such system of individualized assessment applies in the case of ex-offenders such as Miller. The Commissioner may not approve the application of a person who has been convicted of an offense involving the use of a deadly weapon. Chapter 28.1-3 provides, in relevant part:

> No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license, excepting only if such person shall have received, since the time of his conviction, an honorable discharge from any branch of the armed services of the United States of America, and if, in the discretion of the public vehicle license commissioner, such person is trustworthy of the responsibility imposed by the issuance of such license. ***No such license shall be issued to any person at any time after conviction of a crime involving he use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape.*** (Emphasis added.)

It is the constitutionality of the emphasized portion of this section which is at issue in the case at bar.

An additional section of the Code (Chapter 101 *et seq.*) governs the administration of all licensing ordinances within the City of Chicago, including the Public Chauffeur's Ordinance. If a license application is denied after an investigation into an applicant's "character or fitness," Ch.101-5 provides that the applicant "shall be notified, in writing, of the reasons for the disapproval." He may then request a hearing on the disapproved application. Similarly, those already licensed may request a hearing if their license is revoked. (Ch.101-27).

2. Decisions of the Lower Courts

The district court granted the Commissioner's motion to dismiss in a short memorandum opinion. (App., at 15-16). The court found the ordinance was rationally related to a legitimate public purpose, and that the provision absolutely precluding Miller's licensure was rational.

The Court of Appeals reversed. It began its decision with an analysis of the provisions of the ordinance itself. The court noted that although each applicant must satisfy a "good character and reputation" investigation, nonetheless the defendant Commissioner is not allowed to issue a license to persons such as Miller who were once convicted of certain disabling offenses. The ordinance also specifies standards of conduct for licensure, including acts which may lead to the revocation of a license. Ch.28.1-10 provides that the violation of "any criminal law, which, if convicted for such offense, would disqualify any applicant for a chauffeur's license" is an element which may lead to revocation, at the discretion of first the Commissioner and then the mayor. Thus, said the Court of Appeals:

> [P]laintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery over eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday. (App., at 20).

The court found the Commissioner's "purported justification" for this different treatment of similarly situated persons wholly unpersuasive. Rejecting his argument that the licensees' "track record" explains the distinction, the court reasoned:

> The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. However, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch.28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation. (App., at 20-21).

Concluding that "such distinctions among those members of the class of ex-offenders are irrational," the court held that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

The majority of the panel, holding the ordinance invalid on equal protection grounds, found it unnecessary to reach

plaintiff's due process arguments, although it did discuss them. Judge Campbell, concurring, did reach the due process issue, however, concluding:

> Due process considerations require only that the applicant be given a meaningful opportunity to present evidence of good character and fitness in contravention of any contrary inference based upon his prior conduct. (App., at 45).

Since the ordinance prohibits such consideration, Judge Campbell concluded that Luther Miller's rights as guaranteed by the Due Process Clause were also violated.

SUMMARY OF THE ARGUMENT

Luther Miller was denied, and is permanently barred from obtaining, a public chauffeur's license because twelve years ago he was "convicted of an offense involving the use of a deadly weapon." Chapter 28.1-3, Municipal Code of Chicago. This provision imposes a life-time bar to the licensure of certain ex-offenders.

The ordinance at issue in this case is a criss-cross of irrational discriminations, and has been found to be so by both federal and state courts. *See, e.g., Miller v. Carter,* 547 F.2d 1314 (7th Cir. 1977); *Roth v. Daley,* 119 Ill.App.2d 462, 256 N.E.2d 166 (1970). Luther Miller and others convicted of a misdemeanor or felony "involving the use of a deadly weapon" are barred for life from obtaining a public chauffeur's license. The Commissioner is thus precluded from even considering their present fitness for a license. At the same time, the following groups can obtain or retain licenses:

(a) persons with existing licenses who have recently committed the same crime as Miller committed in the past;

(b) applicants or licensees who have committed even more serious crimes than Miller, or who have bad driving records, or who have committed crimes while using cars (or taxi-cabs);

(c) applicants or licensees for essentially any other profession licensed by the State of Illinois or the City of Chicago.

Moreover, no theoretical or actual difference exists between Miller and the other groups described above which can justify the disparate treatment. Whatever degree of difference exists does not support the absolute extent of differing treatment provided. Luther Miller may never be considered for licensure, and is forever denied an individualized determination of his fitness, no matter how old his crime or good his character. For all others, past or current illegal conduct is only one factor in an over-all evaluation of fitness for licensure. As part of that evaluation, each is entitled to have his present fitness considered. This gross disparity is at the heart of the unconstitutional inequality visited upon Miller and others like him. *See, e.g., James v. Strange,* 407 U.S. 128 (1972); *Baxstrom v. Herold,* 383 U.S. 107 (1966). The unconstitutionality of the ordinance is heightened where, as here, the class being discriminated against is a discrete and insular minority.

Furthermore, for all license applicants but Miller and the few like him, the Commissioner evaluates "character and fitness." This includes weighing evidence of past illegal conduct, history of employment, character and reputation, and ability to perform as a public chauffeur. This focused inquiry into fitness for licensure is necessary and appropriate under this Court's decisions, especially where the licensure affects access to a broad field of private employment or common occupation. *See, e.g., Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Sugarman v. Dougall,* 413 U.S. 634 (1973). A licensing ordinance which precludes focused inquiry into the present fitness of a small group while providing such inquiry to all others, including many similarly situated, is irrationally under- and over-inclusive.

Both federal and state courts applying these principles have found the ordinance at issue here to be irrational. Its irrationality stems from the disproportionate treatment given certain ex-offenders as compared to those licensees who have committed the same crimes more recently but face no absolute and/or permanent exclusion. *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977). Moreover, as the Illinois Appellate Court has found, the categorization of crimes in the ordinance is irrational, since more serious crimes than Miller's do not lead to the same kind of exclusion. *Roth v. Daley, supra.* These irrationalities are heightened by the facts that: no exclusion flows from more job-related crimes; Chicago and Illinois have no similar lifetime exclusions for other types of licensed employment which are related to public safety; and other cities have not enacted lifetime bans on ex-offenders in public chauffeur licensing ordinances.

Despite the criss-cross of irrational classifications, the Commissioner ignores all but the distinction between licensees and applicants, and defends it solely on the grounds that existing licensees' "track records" are greater. But under the scheme at issue, licensees actually may not even be working as public chauffeurs, and so they therefore have neither track records nor substantial interests in their licenses. Moreover, applicants such as Miller have an employment and fitness history after their conviction upon which to evaluate fitness, whereas licensees can be evaluated only by information which pre-dates their more recent convictions. The "track record" argument, therefore, as the Court of Appeals found, reverses reality. Since the ordinance is allegedly predicated upon the fact that conviction of a specified offense alone justifies a lifetime exclusion, the Commissioner's "track record" argument ignores what he claims to be the key element, since he continues to license those with no history between themselves and the conviction, while refusing

to license applicants who may have a long post-conviction history of responsible, crime-free behavior.

Even if licensees have a greater interest in their licenses than applicants do in receiving one, in a licensing ordinance controlling access to common private employment the degree of differing treatment visited upon the two similarly situated groups is irrational. Miller's fitness may not be considered and he is permanently barred from licensure, whereas the licensee is entitled to immediate and full consideration.

Measured against the clearly established principles of the Equal Protection Clause of the Fourteenth Amendment, the ordinance prohibiting the licensure of Luther Miller for life must be struck down.

The ordinance also embodies an irrebuttable presumption that Miller is forever unfit, which violates due process. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). The barrier to licensure is based on a presumption that is both conclusive and life long. This absolute barrier exists for a few, excluding them from common private occupations and therefore, the important right to work, even while there exists a mechanism for evaluating the fitness of other applicants and licensees generally. This mechanism for all other applicants and licensees is explicitly designed to judge the same elements of character and fitness which underpin the exclusion of Miller. Under these circumstances the irrebuttable presumption is irrational and violates due process.

ARGUMENT

I. This Court's Opinions Establish That A Licensing Ordinance Must Be Rationally Based And Sufficiently Focused On Present Fitness In Its Treatment Of Ex-Offenders.

A. A Number of Recent Decisions of This Court Have Struck Down Over- and Under-Inclusive Classifications Similar to Those Created by the Ordinance At Issue.

It is well established that the Equal Protection Clause prohibits arbitrary discrimination between similarly situated persons.

> [T]he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

See also Reed v. Reed, 404 U.S. 71 (1971).

A number of recent decisions of this Court have declared as invalid classifications similar in many respects to those created by the ordinance here. In doing so, the Court has not necessarily used an outcome-predictive categorization, such as "suspect class." Rather, it has assessed whether the disparity in treatment between two otherwise virtually identical groups has a reasonable basis in light of the purposes of the statutory scheme.

Thus, in *James v. Strange*, 407 U.S. 128 (1972), this Court unanimously declared unconstitutional a Kansas provision requiring defendants to repay the state for services provided them in defense of a criminal action, insofar as such defendants were deprived of the same exemptions (*e.g.*, limitations with respect to wage garnishments) afforded other judgment debtors. Although recognizing that the state's

claim to reimbursement might take precedence over other creditors, the Court held this differentiation between debtors violated the Equal Protection Clause, because like groups—neither of which were suspect, and neither of which were being deprived of a fundamental interest—were being exposed to vastly disparate treatment:

> The indigent defendant who is found guilty is uniquely disadvantaged in terms of the practical operation of the statute. A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions. 407 U.S. at 139.

Sensitive to the status of the plaintiff, and finding inadequate basis for the considerable differential treatment, the Court concluded that the law embodied "elements of punitiveness and discrimination" which violated rights guaranteed by the Fourteenth Amendment, despite the admitted state interest in recoupment. 407 U.S. at 142.

James v. Strange did not require that defendants and others be treated identically, but only more evenly; it was the disproportionately disparate treatment which violated the guarantees of equal protection. Similarly, in *Baxstrom v. Herold*, 383 U.S. 107 (1966), where there were also substantially different interests as between those in prison who may be mentally ill and those who were not yet in custody who would face an initial deprivation of liberty due to commitment, this Court held:

> Where the state has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be true that Baxstrom is presently mentally ill and such a danger that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands Baxstrom receive the same. 383 U.S. at 114-15.

See also O'Brien v. Skinner, 414 U.S. 524 (1974), declaring violative of equal protection guarantees a system denying pre-trial detainees the right to vote when other such detainees located out of their home county could vote by absentee ballot; *Rinaldi v. Yeager*, 384 U.S. 305 (1966), declaring unconstitutional a scheme requiring indigent incarcerated persons, but not indigent persons who are not incarcerated, to pay for appellate transcripts.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Court struck down as both over- and under-inclusive a classification whereby illegitimate children born prior to the onset of a parent's disability were eligible for Social Security benefits, whereas after-born children were normally deemed ineligible. The government insisted that the classification was necessary to prevent fraudulent claims, but this Court disagreed.

> It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates

> without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses. 417 U.S. at 636.

Thus, over-inclusive and under-inclusive classifications, classifications with a disproportionate and unfair impact on the burdened group, given the governmental interest, classifications which do not rationally further a legitimate governmental interest, cannot withstand Fourteenth Amendment scrutiny. As discussed below, the ordinance here suffers from all these flaws.

B. Ex-Offenders Constitute a Discrete and Insular Minority.

In each of the decisions discussed at some length above, the class of persons ultimately protected by the Court belonged to a politically vulnerable and/or traditionally disadvantaged group[1]. As such, the decisions are consistent with the special responsibility recognized long ago by this Court to scrutinize carefully laws directed against a "discrete and insular" minority. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938):

> [P]rejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

In *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), and *In re Griffiths*, 413 U.S. 717, 721 (1973), this Court held that resident aliens were a "discrete and insular" minority. The law at issue in *Sugarman* indiscriminately disqualified

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[1] *James v. Strange*, 407 U.S. 128 (1972), ex-offenders; *Baxstrom v. Herold*, 383 U.S. 107 (1966), prisoners; *Jimenez v. Weinberger*, 417 U.S. 628 (1974), illegitimate children.

aliens from a significant number of jobs, ranging from typists and office workers to persons who directly participate in the formulation and execution of important state policy. 413 U.S. at 643. *In re Griffiths* was explicit about the past and present discrimination affecting aliens:

> In subsequent decades, wide ranging restrictions for the first time began to impair significantly the efforts of aliens to earn a livelihood in their chosen occupations. 413 U.S. at 719.

Ex-offenders, very much like aliens, are a discrete and insular minority.[2] Upon completion of his sentence and reentry into society, the convicted individual finds that numerous rights and opportunities are withheld by law or custom. The existence of widespread discrimination has been recognized by this Court[3] and by numerous commentators[4], and

[2] Respondent recognizes that at other times this Court has equated a "discrete and insular minority" with a "suspect classification." *Sugarman v. Dougall*, 413 U.S. 634 (1973). Respondent is not arguing here that ex-offenders are a "suspect class". However, the Court's definition of a suspect class, as expressed in *Rodriguez v. San Antonio School District*, 411 U.S. 1, 28 (1973), and again in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), does bear a significant resemblance to the attributes of ex-offenders:

> [A] suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the political process.

These factors should be weighed in scrutinizing the discrimination at issue in this case.

[3] *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Street v. New York*, 394 U.S. 576, 579 n.9 (1969); *Sibron v. New York*, 392 U.S. 40, 55 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 237-8 (1968); *Ginsberg v. New York*, 390 U.S. 629 (1968); *DeVeau v. Braisted*, 363 U.S. 144 (1960); *Trop v. Dulles*, 356 U.S. 86 (1958); *Fiswick v. United States*, 329 U.S. 211 (1946).

has generally been condemned. For example, the 1967 President's Commission on Law Enforcement and Administration of Justice concluded:

> As a general matter [the law in this area] *has simply not been rationally designed to accommodate the varied interests of society and the individual convicted person.* There has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up. Little consideration has been given to the need for particular deprivations in particular cases. (Emphasis added). *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* at 89 (1967).[5]

The ordinance at issue here is just one small part of the systemic discrimination which affects ex-offenders. It represents the system at its most extreme, repressive and irrational.

The Vanderbilt Special Project, *supra* note 4, is the most exhaustive survey of the nature and extent of ex-offender disabilities. It concludes that civil disabilities in England were not only the outgrowth of the retributive and deterrent theories of the criminal justice system, but also of economic conditions which allowed for the exploitation of a segment —offenders—of an impoverished urban mass. Inasmuch as

[4] Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970) [hereinafter "Vanderbilt Special Project"]; Cohen, *Civil Disabilities: The Forgotten Punishment*, 35 Fed. Prob. 19 (June, 1971); Rubin, *Man With a Record: A Civil Rights Problem*, 35 Fed. Prob. 3 (Sept. 1971); Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, Part I, 59 J. Crim. L. 347 (1968); *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* (1967).

[5] *See also* the ABA *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, 14 Am. Crim. L. Rev. 377 (1977).

America's legal heritage is an outgrowth of English jurisprudence, early civil disabilities in this country were "the result of the unquestioning adoption of the English penal system by our colonial forefathers and the succeeding generations who continued existing practices without evaluation." Vanderbilt Special Project, at 950. The origin of civil disabilities for ex-offenders was principally an attempt to isolate and condemn ex-offenders, thereby actually preventing them from reintegrating into the larger society.

In addition to occupational licensing restrictions, such as the one found in the case at bar, the scope of the discrimination visited upon ex-offenders is widespread.[6] Its effect is to render the ex-offender a second class citizen. Thus, for example, ex-felons have been denied the right to vote, *Richardson v. Ramirez*, 418 U.S. 24 (1974),[7] and denied the right to hold public office.[8] Ex-offenders are often excluded from private[9] and public[10] employment.[11] While every such restriction may not necessarily be irrational, the restrictions are widespread in both the private and public sectors and reflect a general societal attitude toward the ex-offender which does not allow for differentiation between specific societal needs and a more general impulse to ostracize ex-offenders.[12]

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[6] See generally, Vanderbilt Special Project, *supra* note 4, at 967-1143 (1970).

[7] *But see Ramirez v. Brown*, 12 Cal.3d 912 (1975), 528 P.2d 378, 117 Cal. Rptr. 562 (1975); Ill. Rev. Stat., Ch. 38, § 1005-5-5(d), insuring ex-felons the right to vote.

[8] Vanderbilt Special Project, *supra* note 4, at 987. No prohibition exists in Chicago against ex-offenders holding public office.

[9] D. Glaser, *The Effectiveness of a Prison and Parole System* 311-401 (1964); G. Pownall, *Employment Problems of Released Prisoners* (Jan. 1969). See, however, *Green v. Missouri-Pacific Railroad Company*, 523 F.2d 1290 (8th Cir. 1975); Rovner-Pieczenik, *Manpower Programs for the Offender* (April 1, 1976); Chamber of Commerce of the United States, *Marshaling Citizen Power to Modernize Corrections* 13-14 (1971).

[10] *E.g.*, United States General Accounting Office, *Civil Service Commission Actions and Procedures Do Not Help Ex-Offenders Get Jobs With The Federal Government* (July 1, 1976).

[11] Vanderbilt Special Project, *supra* note 4, at 1001-1017. It is accepted that lack of employment, particularly immediately after release from prison, is a major cause of recidivism among ex-offenders. Glaser, *The Effectiveness of a Prison and Parole System* (1964); Toborg, *The Transition from Prison to Employment: An Assessment of Community-Based Assistance Programs* (May, 1977); Horowitz, *Back on the Street—From Prison to Poverty* (June, 1976). See generally, American Bar Association, *Removing Offender Employment Restrictions* (March, 1976). The social disutility of the restrictions is principally responsible for the ABA coordinated attack upon ex-offender restrictions. *See also* Burger, *Thoughts on Prison Reform: The Corrections Addresses of the Chief Justice of the United States, 1970-1975* (Sept., 1975).

[12] This attitude was touched upon by Chief Justice Burger in his speech to the Midwinter Meeting of the American Bar Association (Feb., 1970) when, speaking of our society's failure to successfully reintegrate the ex-offender, he said:

> If we want prisoners to change, public attitudes towards prisoners and former prisoners must change. We have some community efforts along these lines in this country, but with few exceptions it is thin, scattered and not well-led or organized.

Prior to the end of the 19th century, very few occupations were subject to licensure requirements.[13] The situation is radically altered today. In 1974 the American Bar Association isolated over 4,000 state statutory provisions requiring occupational licenses covering "a variety of vocations, trades, professions and callings."[14] Over seven million per-

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[13] W. Gellhorn, *Individual Freedom and Governmental Restraints* (1956); *In re Griffiths*, 413 U.S. 717, 719 (1973).

[14] Hunt, Bowers, Miller, *Laws, Licenses, and the Offender's Right to Work*, ABA (1974), at 4. The 4,000 figure does not include local ordinances, such as the one at issue here.

sons worked in licensed occupations, as of 1969[15]. At least one commentator has explained this huge growth of licensure as a result of the pressure of the present members of an occupation for both status and as a means of limiting the entry of others into their occupation[16]. As a result of this process, licensing provisions tend to be enacted piecemeal, without any attempt to embody a uniform philosophy or policy towards ex-offenders[17]. Thus, ex-offenders are subject to unreasonable and unreasoned exclusion from entry into licensed occupations.

The ex-offender is a member of a discrete and insular minority. He is discriminated against and excluded from the political process. He is also generally poor[18] and often a member of a minority[19] racial group. Above all else, he is an outcast, having transgressed the bounds of acceptable behavior. For these reasons ex-offenders are politically powerless to affect the widespread, often irrational, discrimination

[15] *Ibid.*, relying upon *Occupational Licensing and the Supply of Non-Professional Manpower*, Report to Manpower Administration, U.S. Department of Labor, Manpower Administration, Monograph No. 111 (1969).

[16] W. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1976).

[17] Some of the resulting inconsistency noted above has been mitigated in recent years. As reported by the Clearinghouse on Offender Employment Restrictions, *Report on 1977 State Legislative Action to Remove Offender Job Restrictions*, ABA (1977), by the end of 1976 23 states had taken action to alleviate job barriers for ex-offenders.

[18] R. Horowitz, *Back on the Street—From Prison to Poverty*, American Bar Association, June, 1976.

[19] U.S. Department of Labor, *Unlocking the Second Gate, The Role of Financial Assistance in Reducing Recidivism Among Ex-Prisoners* (1977).

visited upon them[20]. Inasmuch as ex-offenders as a group are a "discrete and insular minority," this Court must look carefully at ordinances such as the one in the case at bar to insure that they do not violate the dictates of the Equal Protection and Due Process Clauses of the Fourteen Amendment.

Nor does the fact that ex-offenders have committed criminal acts in the past in any way mitigate this Court's responsibility for careful scrutiny. Whether under the Equal Protection Clause, *James v. Strange*, 407 U.S. 128 (1972), *Baxstrom v. Herold*, 383 U.S. 107 (1966), or the Due Process Clause, *Wolff v. McDonnell*, 418 U.S. 539 (1974), it is clear that the protection of the Constitution may not be withdrawn from persons because of their past transgressions.

C. Licensing Provisions Which Irrationally Fail to Establish a Sufficiently Focused Inquiry Into A Group of Applicants' Present Fitness Violate the Equal Protection Clause.

This Court has considered the constitutional legitimacy of a number of licensing provisions over the years. In applying equal protection principles, the Court has demanded that there exist a sufficiently focused inquiry into the present fitness of license applicants. This grows out of the undoubted importance of the individual's right to engage in the common occupations of life.

> Insofar as a man is deprived of the right of labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are per-

[20] This Court has recognized in other contexts that there exist laws in our society which represent an archaic mode of thought. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (illegitimacy classifications); *Califano v. Goldfarb*, 97 S.Ct. 1021 (1977) (sex classifications).

> mitted to work. *Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. Smith v. Texas*, 233 U.S. 630, 636 (1914). (Emphasis added).

See also Truax v. Raich, 239 U.S. 33, 41 (1915); *Examining Board v. Flores de Otero*, 426 U.S. 572, 604 (1976).[20A]

Licensing provisions which restrict or prohibit licensure seriously impair that right, so that legislation which operates irrationally to exclude individuals from employment in common occupations because they are perceived unfit has come under careful scrutiny.

This is not to say that a licensing provision may not be based on objective qualifications or character traits.[21]. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), is typical of those cases where the objective criteria imposed for licensure were sufficiently focused upon fitness.

[20A] As Judge Campbell observed in his concurrence below:

> The right to engage in a particular type of employment may not be a "fundamental right" for the purposes of the strict scrutiny test, but it is nevertheless a very important right. (App., at 44).

[21] Decisions such as *New Orleans v. Dukes*, 427 U.S. 297 (1976), are not relevant to this case. In *Dukes*, a grandfather provision of a vending license provision had the effect of excluding all but a few persons from work in the New Orleans Old Quarter. The ordinance was wholly unrelated to individual qualification; its purpose was to limit and eventually eliminate all vendors from the New Orleans Old Quarter so as to assure that the area retained its original French character. As a purely economic regulation, there was no need for any inquiry into an applicant's fitness. *See also Kotch v. Pilot Commissioners*, 330 U.S. 552 (1947) (limiting the number of persons who can become river boat pilots); *McGowan v. Maryland*, 366 U.S. 420 (1961) (prohibiting certain merchants from selling their wares on Sunday). The ordinance at issue here has no economic purpose.

In *Williamson*, only licensed optometrists and ophthamologists were allowed to fit eyeglasses without a prescription, even though a prescription was sometimes unnecessary. Since opticians as a class were medically unqualified to write prescriptions, the public health would be endangered if glasses were fitted by opticians when a prescription was required. The regulation was therefore valid because "the legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify the regulation of the fitting of eyeglasses." 348 U.S. at 487. *See also Ferguson v. Skrupa*, 372 U.S. 726 (1963) (prohibiting all but lawyers from engaging in the business of debt adjusting because debt adjusters' clients may very well need legal advice); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949) (prohibiting insurance agents, because they were insurance agents, from also engaging in the funeral business, in order to avoid fraudulent collusion between the insurance and funeral businesses).

Moreover, to the degree that the above cases involve legislative judgments as to ability that are not universally true, the case holdings reflect the fact that the legislative judgments *define the functions* that are carried out by the occupation as a whole. In this respect, the cases are premised on significantly different factors from those cases which do not consider the scope of work of the occupation, but which rather consider the standards imposed for obtaining a license for access to the defined job, and whether such standards are sufficiently focused on job qualification, as well as evenly applied.

The leading case in this latter category is *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), holding that a licensing authority did not conduct a satisfactorily focused inquiry into fitness. In *Schware*, the license applicant had passed the bar exam and was in all other respects objectively

qualified to practice law as that job was defined in the state licensing law. Nonetheless, the bar examiners denied him a license because they felt that Schware's past conduct, although unrelated to his legal abilities, made him morally unfit to receive a license. The Court held:

> [A]ny qualifications must have a rational connection with the applicant's fitness or capacity to practice law. [Citations omitted]. 353 U.S. at 239.

The Court proceeded, in light of this test, to examine in depth the three separate charges against the applicant—his use of an alias, his arrest record, and his prior membership in the Communist Party. In each instance, the Court found these past factors insufficient to establish the petitioner's present unworthiness for a license. Furthermore, said the Court, the cumulative weight of the three charges did not make the result any different: "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."[22] 353 U.S. at 246-7. Thus, *Schware* establishes that the inquiry into fitness is insufficient unless it focuses on the present fitness of the applicant for licensure.

More recently, *In re Griffiths*, 413 U.S. 717 (1973), declared unconstitutional a Connecticut law which prohibited aliens from the practice of law. The state argued that alien lawyers might divide their loyalties between this country and another, and would therefore be unfit officers of the court. Although the Court rejected the state's claim as without foundation, it made the following important observation: "Nor would the possibility that some resident

[22] While *Schware* may be viewed as a due process decision, its analysis is equally appropriate under the Equal Protection Clause. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J. concurring).

aliens are unsuited to the practice of law be a justification for a wholesale ban." 413 U.S. at 725. Indiscriminate barriers to licensure are contrary to the law. Citing *Schware, supra, In re Griffiths* reaffirmed that, even if a suspect classification had not been involved,

> in applying permissible standards officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. 413 U.S. at 725.

The rationale for the decision in *Sugarman v. Dougall*, 413 U.S. 634 (1973), is the same as that in *In re Griffiths*: neither law's bar to licensing aliens allowed for a sufficiently focused inquiry into the fitness of individuals.

As a part of this inquiry, one must take into account the nature of the occupation. A higher degree of trust and competence is demanded from persons in professional callings[23] than in more common occupations. In *Sugarman*, New York State claimed that since its employees participate in the formulation and execution of government policy, they must be free from competing obligations to other countries. But New York's law excluding aliens applied to sanitation workers and clerks, as well as high governmental employees. As a consequence,

> the State's broad prohibition of the employment of aliens applies to many positions with respect to which

[23] From a profession charged with such responsibilities there must "be exacted those qualities of truth-speaking, of a sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as moral character." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). *See also Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 766 (1976).

the State's proferred justification has little, if any, relationship.[24] 413 U.S. at 642.

Sugarman and *Griffiths* do not require that every individual be licensed. Each applicant must still satisfy generally applied rational criteria for eligibility. The cases do, however, reject irrational criteria restricting persons "from engaging in private enterprises and occupations which are otherwise legal." *Examining Board v. Flores de Otero*, 426 U.S. 572, 603 (1976). The decisions reflect a societal preference for allowing individuals to succeed on their own merit, within the marketplace, and free from artificial or discriminatory standards impeding success.

Thus, in cases which involve licensure of access to a broad field of private employment this Court has closely scrutinized licensing provisions which, rather than defining the functions of the licensed job or regulating for economic reasons, simply bar narrow groups of persons from access to the employment field based on sweeping concepts of personal fitness.

Decisions of lower federal and state courts have followed this Court's lead and refused to sanction such licensing restrictions or decisions which do not provide a sufficiently focused inquiry into the applicant's fitness for a defined field of employment.

Twice before, courts have considered Commissioner Carter's decision to deny a public chauffeur's license application. In *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), the United States Court of Appeals for the Seventh Circuit

[24] The constitutionality of the restrictions upon license applicants may also be affected by the degree of control which can be imposed upon them once a license is issued. *See e.g. In re Griffiths*, 413 U.S. 717, 727 (1973); *Examining Board v. Flores de Otero*, 426 U.S. 572, 606 (1976).

examined Commissioner Carter's denial of a license to an applicant who had had psychiatric treatment fourteen years before. Relying heavily upon *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), the court held that the defendant's failure to inquire into the applicant's present mental status "would appear to reflect an archaic attitude in the field of mental health," 489 F.2d at 1380, and affirmed the damage award of $1,500.

Equally relevant is *Roth v. Daley*, 119 Ill.App.2d 462, 256 N.E.2d 166 (1970), where the Illinois Appellate Court found invalid the same ordinance provision as at issue here. Roth had been convicted of two counts of armed robbery in 1950 and was sentenced to prison. Thereafter he drove an ambulance for a number of years. When he applied for a license in 1967, the year the ordinance at issue here was made applicable to ambulance drivers, his application was refused, as required by the last sentence of Ch.28.1-3. The court focused on the fact that the ordinance would allow the licensure of felons convicted of murder, and other major crimes, but not of an armed robber like Roth:

> In our opinion *the provisions set forth in the last sentence in the last paragraph of 28.1-3 result in classifications which are unreasonable and arbitrary.* Under these provisions an applicant who has perpetrated multiple murders by strangulation, poison and arson could be licensed, as could one who had been repeatedly convicted of Attempt to Rape, Burglary, Theft, Kidnapping or Aggravated Battery. In view of this fact, we fail to perceive in what manner the prohibition contained in the ordinance bears any relationship to public health or safety. In our opinion the circuit court correctly held this portion of the ordinance invalid as to the plaintiff. 119 Ill.App.2d at 468-69. (Emphasis added).

Thus, while recognizing that the city's police power to regulate occupations was broad, 119 Ill.App.2d at 468, the Court found this ordinance to be "manifestly unreasonable . . . arbitrary . . . and unrelated to the public purpose sought to be attained," 119 Ill.App.2d at 468,[25] its over- and under-inclusive terms operating so as to irrationally prohibit any inquiry into Roth's fitness for licensure.

Beazer v. New York City Transit Authority, Nos. 76-7295, 77-7092 (2nd Cir. June 22, 1977), is a recent and significant lower court decision. Plaintiffs in *Beazer* challenged the New York Transit Authority's blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs. Affirming the trial court injunction against the rule, 399 F.Supp. 1032 (S.D.N.Y. 1975), the Second Circuit concluded that the evidence demonstrated that:

> [A]fter a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures. (Slip Opinion, page 3).

Although not prohibited from adopting necessary regulations to ensure employability and to prevent employment in "safety sensitive" jobs, the transit authority was enjoined from applying its methadone rule. Relying heavily upon *Sugarman v. Dougall*, 413 U.S. 634 (1973), the court

[25] Indeed, Commissioner Carter has never explained why he continued to enforce the last sentence of Ch. 28.1-3, in view of the broad language of *Roth v. Daley, supra*. In light of an authoritative decision of a state appellate court holding the provision at issue here "arbitrary . . . and unrelated to the public purpose sought to be attained," this Court should consider dismissing certiorari as improvidently granted, or in the alternative remanding to the Court of Appeals for further consideration in light of *Roth v. Daley*.

held that the rule has "no rational relation to the demands of the jobs to be performed." (Slip Opinion, page 3).

A similar analysis was made in *Butts v. Nichols*, 381 F.Supp. 573 (S.D. Iowa 1974) (3-judge court), striking down an Iowa civil service employment disability, imposed upon ex-felons, as to civil service jobs and employment with the police and fire departments. The state justified the ban as a "protective one". The court admitted the validity of the purpose, but held that the means employed were impermissibly arbitrary, based on the irrational categories of crimes used to bar employment:

> [The statute] is both over and under inclusive: persons who clearly serve the public interest are denied civil service jobs, while misdemeanants convicted of crimes involving a lack of probity suffer no disqualification. In short, no consideration is given to the nature and seriousness of the crime in relation to the job sought. The time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed are similarly ignored. 381 F.Supp. at 581.

The court in *Butts v. Nichols* also noted that the arbitrariness of the bar on all felons was greatly increased when compared to other laws where the proscription did not exist. An ex-felon in Iowa, for example, could hold the positions of city solicitor, treasurer, auditor, assessor, or city manager. Thus, said the court, the Iowa statutory scheme suffered from the defects of irrationality on two counts.[26]

[26] Other significant federal decisions include: *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (rule prohibiting hiring unwed parent for teaching position denies equal protection since those similarly situated and employed have a hearing before dismissal); *Thompson v. Gallagher*, 489 F.2d

II. The Lifetime Exclusion Of Miller Is Irrational And Unjustified By Any Legitimate Governmental Interest.

A. The Life Long Prohibition Against the Licensure of Certain Ex-Offenders Creates an Irrational Classification Disproportionately Burdening Mr. Miller and Others Like Him and Prohibiting any Inquiry into Their Present Fitness for Licensure.

Chapter 28.1-3 of the Municipal Code of the City of Chicago is arbitrary and irrational, and violates Luther Miller's right to the equal protection of the laws, because it does not provide for him a sufficiently focused inquiry—or any inquiry—into his fitness for licensure; the class to which Miller belongs—persons barred from licensure for life—is disadvantaged far out of proportion to others similarly situated who are entitled to an individualized determination of fitness. The result is the creation of irrational classifications which are by the ordinance's own terms both over- and under-inclusive. Forever excluding Mr. Miller from licensure is not related to any rational governmental purpose. Indeed, this ordinance is properly viewed as an

443, 449 (5th Cir. 1973) (rule prohibiting hiring person with dishonorable discharge for city job "without any consideration of the merits of each individual case irrational."); *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968) (regulations for admission to medical staff not rationally related to qualification); *Carr v. Thompson*, 384 F.Supp. 544 (W.D. N.Y. 1974) (several old criminal convictions probably not directly related to qualification as city employee); *Osterman v. Paulk*, 387 F.Supp. 669, 671 (S.D. Fla. 1974) (failure of city to hire clerk applicant unconstitutional because no rational nexus between off-duty or prior conduct—one marijuana conviction—and the duties of the job in question); *Pavone v. Louisiana State Board of Barber Examiners*, 364 F.Supp. 961 (E.D. La. 1973), *aff'd*, 505 F.2d 1022 (5th Cir. 1974); *Green v. Silver*, 207 F.Supp. 133 (D.D.C. 1962). State decisions include: *Carturight v. Board of Chiropractic Examiners*, 16 Cal.3d 762, 548 P.2d 1134, 129 Cal. Rptr. 462 (1976) (en banc); *Miller v. D.C. Board of Appeals and Review*, 294 A.2d 365 (D.C. App. Ct. 1972); *Perrine v. Municipal Court*, 5 Cal.2d 656, 488 P.2d 648, 97 Cal. Rptr. 320 (1971).

atavistic remnant of the systemic discrimination typically visited upon ex-offenders, a system which both the City of Chicago and the State of Illinois have otherwise rejected. See notes 39, 40 *infra*, and accompanying text.

The irony is that the City of Chicago can hardly argue that such a Draconian scheme is necessary. The "character and reputation" of every other applicant for a public chauffeur's license is investigated prior to licensure. Ch. 28.1-4, Municipal Code of Chicago. After investigation, the Commissioner must "be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle" before issuing the license. Ch.28.1-3, Municipal Code of Chicago. Nonetheless, solely as a result of a twelve-year-old criminal conviction Mr. Miller is denied the same individualized inquiry into his character. It is presumed bad. Similarly, if an applicant for the license is denied, for whatever reason, he has a right to further individualized consideration in a hearing to contest that denial. Ch.101-5, Municipal Code of Chicago.[27]

[27] Chapter 101 of the Chicago Municipal Code establishes procedures for all license applicants and licensees. Chapter 101-5 provides, in relevant part that:

> If the mayor disapproves the license application the unsuccessful applicant shall be notified in writing, of the reasons of the disapproval. The applicant may within 10 days after receiving notice of the disapproval make a request, in writing, to the mayor for a hearing on the disapproved application. Within 10 days after a request for hearing is made, a public hearing shall be authorized before a hearing examiner appointed by the mayor who shall report his findings to the mayor. The public hearing shall be commenced within 10 days after it is authorized. The mayor shall within 15 days after such hearing has been concluded, if he determines after such hearing, that the license application be disapproved, state the reason for such determination in written finding and shall serve a copy of such finding upon the license applicant.

See Freitag v. Carter, 489 F.2d 1377, 1383 (7th Cir. 1973), and discussion at n.44, *infra*.

Granted, Mr. Miller had a theoretical right to a hearing under the ordinance. However, the procedure would have been a meaningless sham, since the absolute prohibition against his licensure once again precluded any individualized determination of his fitness. Finally, licensees whose licenses are revoked, after the exercise of discretion by the Commissioner and then the mayor, Ch. 28.1-10, Municipal Code of Chicago, are also entitled to an individualized determination of their continued fitness for licensure. Ch. 101-27, Municipal Code of Chicago.

All persons except the few like Miller are entitled to an individual determination of fitness.[28] Luther Miller is never similarly evaluated. As far as the Commissioner is concerned, the remainder of his life is irrelevant. This differentiation is wholly out of proportion to the actual distinction which allegedly exists between Miller and others. The differing treatment is absolute, not one of degree. It operates like a meat ax for a few, while retaining the possibility of subtle flexibility for all others.

One aspect of this irrationality lies in the fact that while persons convicted of certain criminal offenses years ago may never be licensed, commission of the same offense by a licensee today does not result in the automatic loss of license. As stated by the Court of Appeals:

> Thus, Plaintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday. App., at 20.

On the basis of this irrational result, the Court of Appeals declared Ch.28.1-3 unconstitutional. The distinction throws

[28] Persons convicted of felonies other than those specifically mentioned in Ch. 28.1-3, and misdemeanors involving 'moral turpitude,' must wait eight years from conviction.

into sharp relief the requirement of the ordinance to consider the present fitness of licensees, as required by *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), contrasted with the absolute refusal to do the same for applicants with old convictions, even though the probative value of a recent criminal conviction is presumably much greater than is that of an old one. *Theard v. United States*, 354 U.S. 278 (1957); *Sherman v. United States*, 356 U.S. 369, 375-6 (1958).

Additionally, while Miller is excluded, a second group of offenders is included in the Commissioner's elaborate evaluative scheme—those who have committed more serious crimes. This element of irrationality was the basis on which the Illinois Appellate Court in *Roth v. Daley*, *supra*, reached the same result as the Seventh Circuit Court of Appeals.

Numerous very serious offenses, many directly related to vehicular use, do not result in an absolute bar to licensure. One example is kidnapping for the purpose of obtaining ransom, Ill.Rev.Stat., Ch.38, § 10-2(a)(1), a Class 1 felony, which could include use of a car. Ill.Rev.Stat., Ch.38, §10-2(b). Involuntary manslaughter or reckless homicide, Ill.Rev.Stat., Ch.38, § 9-2, offenses which can be committed driving an automobile, are other serious felonies which are subject to no absolute permanent disability. Indeed, the list of offenses is very long. Thus, the licensing structure turns on the name of the offense for which one is convicted, even though the offenses are otherwise indistinguishable.[29] In one case, an individualized determination of

[29] In fact, it is irrational for the most part for a licensing system to condition licensure solely on the fact of a specific criminal conviction. First, it ignores the circumstances surrounding the offense. A person convicted of an offense involving the use of a deadly weapon growing out of personal disagreement where a weapon happened to be available must certainly be evaluated differently

fitness is offered immediately, or after eight years; in the other, no lapse of time allows for the same opportunity. The irrationality of this system is demonstrated by the fact that a person convicted of aggravated kidnapping may be considered for licensure 8 years after conviction. If he serves an 8 year sentence, he may walk out of prison and immediately receive full consideration. In contrast, Miller may have a demonstrated record of responsible citizenship spanning many years, but he remains ineligible for life.[30]

The same incongruity of treatment is evident between those absolutely barred from licensure and those who face no *per se* disqualification despite less serious, but more job-related, crimes. Persons with multiple traffic offenses, including driving while intoxicated, are eligible for licensure at any time, as are persons with a record of automobile accidents. Eighteen-year-olds with extensive juvenile records but no adult convictions are eligible for licensure, even though they also lack, by definition, significant experience as drivers and demonstrated records of responsibility at a job. The point is not that persons convicted of armed robbery are more or less qualified for a public chauffeur's

from someone convicted of a series of assaults upon strangers. Second, the plea bargaining system, which accounts for up to 95% of all criminal convictions, *Brady v. United States*, 397 U.S. 742, 752 (1970), makes it impossible to rely solely upon the name of an offense to which a person eventually pleads guilty to gauge the actual seriousness of the crime.

[30] In the confusion of statistics on recidivism, one fact is clearly established. If an ex-offender remains crime free for a number of years (4 to 7, depending on the study), the chances of his becoming a recidivist are statistically *de minimis*. See Kitchner, Schmidt & Glaser, *How Persistent is Post-Prison Success?* Fed. Prob. (March 1977); Wilkins, *Efficiency, Equity and the Clinical Approach to Offenders: Putting 'Treatment' on Trial*, The Hastings Center Report, Vol. 5, No. 1 (February, 1975).

license than, for example, drunk drivers. The irrationality exists because the former may never receive consideration, whereas the latter may at any time.

The irrationality of the categorization of offenses, as pointed out by *Roth v. Daley, supra*, is underlined by the vagueness of the main exclusionary offense. The ordinance provides that persons convicted of "an offense involving the use of a deadly weapon" may not be licensed. But there is no such offense in the Illinois Criminal Code, Ill.Rev. Stat., Ch. 38, §1 *et seq.*, and an examination of the criminal code demonstrates that an applicant may be forever denied a license for the commission of the most minor offenses. Section 24 of the Illinois Criminal Code, "Deadly Weapons," Ill.Rev.Stat., Ch. 38, §24, includes "Unlawful Use of Weapons," §§24-1 through 10, encompassing crimes which can be either misdemeanors or felonies, and punishable by anything from fine and probation to incarceration in the state penitentiary. Ill.Rev.Stat., Ch. 38, § 1005-5-3.[31] This wide disparity in the perceived seriousness of crimes involving the use of deadly weapons is found throughout the Illinois Criminal Code.[32]

[31] The Commissioner's statement of the "Question Presented" (Petitioner's brief, page 2) is thus in error. He presents the issue in this case as: "Is an ordinance which conclusively denies issuance of a public chauffeur's license to any applicant convicted of certain armed *felonies* violative . . ." (Emphasis added). The prohibition does not apply only to ex-felons.

[32] Aggravated assault (Ch.38, §12-2) is a Class A misdemeanor and punishable by as little as a fine and not more than one year in jail; aggravated battery (Ch. 38, §12-4) is a Class 3 felony punishable by as little as probation or a maximum of one to ten years (Ch. 38, §1005-8-1); armed robbery (Ch.38, §18-2) is a Class 1 felony with a minimum term of four years; armed violence (Ch. 38, §33A-1) is a Class 4 felony with a minimum term of one year.

Thus, the crimes which permanently bar one from licensure are less, or at least no more, serious than many others which do not. Furthermore, they appear on their face less job related than many crimes, including those discussed above, which are not a bar. As a group, the five excluded crimes (or groups of crimes) have only one thing in common; they represent one group's arbitrary and under- and over-inclusive definition of morally offensive acts. Illegal and deviant sex, narcotics and deadly weapons is an uncomfortable triumvirate. While incest is a criminal act, its commission bears no conceivable relationship to the ability to perform as a public chauffeur. The ordinance independently bans the licensure of narcotics addicts and, as has been demonstrated, the weapons provision has too many variations to allow it to be described, without further definition, as the most serious of offenses. Rather, setting this group of five crimes apart and condemning those convicted of them for life, harkens back to a time when the purpose of ex-offender disabilities was to hold persons out for public scorn and ridicule.

But even this medieval stigmatization is carried out irrationally, given the fact that it is not imposed on licensees. As the Court of Appeals necessarily concluded:

> Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. *In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification,* which is that the felony is per se likely to increase a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. App., at 21. (Emphasis added).

The conclusion of unreasonableness is buttressed by an examination of the jobs actually regulated by the public chauffeur's ordinance.

The commissioner has argued this case as if the public chauffeur's ordinance applied only to taxi-cab drivers. (Petitioner's Brief, at 7). It does not. Chapter 28.1-3 also licenses transit drivers who sit in a public forum, and ambulance drivers who work as part of a crew. It strains credibility to suggest that either pose a threat to the safety of their riders (unless the licensee is a poor driver). Assuming, as we must, that Miller and others are purportedly barred from licensure because of the potential threat they pose to the public[33], the ordinance's harsh bar is not related to qualification for at least some of the jobs it regulates.

As to taxi drivers, the professed justification for the ex-offender ban—public safety—while a legitimate concern of the licensing authority, sounds far more substantial than reality requires. A review of similar ordinances in 18 of the largest cities in the United States discloses no other ex-offender ban remotely comparable in its severity to the one here.[34] None of the ordinances imposes a lifetime ban. Eleven

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[33] The Commissioner has never argued otherwise, and in any event, it would be unconstitutional for him to deny Miller a license in order to punish him after he has already been punished once by the State of Illinois for a crime against the state. *Trop v. Dulles*, 356 U.S. 86 (1958).

[34] ATLANTA, GA., Code §34-4; BALTIMORE, MD., Code of Maryland Art. 78, §50H; BOSTON, MASS., City of Boston Police Department Rules and Regulations for Hackney Carriages; CINCINNATI, OHIO, no regulation; CLEVELAND, OHIO, no regulation; DALLAS, TEX., Dallas Code §45-3.2; DENVER, COLO., Municipal Code of the City and County of Denver, Taxicabs §.8; DETROIT, MICH., Detroit Municipal Code §60-2-19; HOUSTON, TEX., Code §45-63; LOS ANGELES, CAL., no regulation; MIAMI, FLA., Code of the City of Miami §56-129; MILWAUKEE, WIS., Milwaukee Code, Ordinance No. 295, §100-65; MINNEAPOLIS, MINN., Minneapolis Code §341 360(g); NEW YORK, N.Y., Local Laws of the City of New York 1971, No. 12, Ch. 65 §2305(b),(g); SAN DIEGO, CAL., San Diego County Taxicab Ordinance §21.312; ST. LOUIS, MO., Revised Code of St. Louis §306.060; SAN FRANCISCO, CAL., Code §11; SEATTLE, WASH., Code Ch. 10.67 §020.

of the cities impose a specific time limitation upon hiring ex-felons, typically three to five years from conviction.[35] The remaining seven cities on the list have either no regulations or impose a good character requirement, which allows the licensing authority to consider a criminal conviction. Chicago's provision barring certain ex-offenders from licensure for life is, within the context of other major cities, disproportionately and irrationally severe.

Indeed, the fishbowl atmosphere of a taxi-cab, where every licensee in Chicago must post his "license and photograph as an exhibit for view by passengers," Ch.28.1-7, Municipal Code

[35] *E.g.*, Milwaukee Ordinance No. 295:

> Part 11. Section 100-65 of the Code is hereby created to read:
>
> 100-65. Taxicab Driver's License.
>
> (2) QUALIFICATIONS AND APPLICATION.
>
> Each applicant for a driver's license must:
>
> (a) Be of the age of not less than 18 years.
>
> (b) Possess a valid state of Wisconsin motor vehicle driver's license.
>
> (c) Be able to read and write the English language.
>
> (d) Be clean in dress and person.
>
> (e) Have police record checked and not have been convicted of any of the following offenses within the last five (5) years:
>
> 1. Manslaughter or negligent homicide resulting from the operation of a motor vehicle.
> 2. Driving a motor vehicle while under the influence of intoxicating liquor or drugs.
> 3. Any felony in which physical violence is used.
> 4. Any crime against sexual morality as specified in Chapter 944 of the Wisconsin Statutes.
> 5. Six (6) or more offenses relating to intoxications.
> 6. Two (2) or more offenses relating to dangerous drugs.

of Chicago, suggests that crimes by drivers against passengers are unlikely.[36]

In addition, a licensee is not even guaranteed a job as a public chauffeur. After licensure, he must be hired by a private company, which may independently refuse to hire him for reasons which might include his criminal record.

The ordinance at issue here is the harshest and most restrictive in the City of Chicago, further buttressing the Seventh Circuit Court of Appeals' conclusion that the reasonableness of the classification itself has been undercut. All but one other[37] of the myriad of licenses is governed by the general character and fitness requirements of Ch.101-5 of the Municipal Code. This provision, which does not prohibit the licensure of ex-offender applicants (but presumably allows the licensing authority to consider a conviction), governs numerous sensitive positions.[38] While the ordi-

[36] Ch.28.1 *et seq.* also prohibits chauffeurs from carrying weapons (Ch.28.1-13); requires finger-printing of applicants (Ch.28.1-4); allows for discretionary renewal of the license each year (Ch. 28.1-9), and provides for fines, suspension or revocation (Ch. 28.1-10 and Ch.28.1-15). In addition Chapter 28, governing cab companies, requires that the cab contain identifying marks (Ch. 28-10), a separate card for the driver (Ch.28-11), and every cab to have four doors (Ch.28-4.1).

[37] A person may not operate a security firm if he has been convicted of a felony within the last ten years. Municipal Code of Chicago, Ch. 117.

[38] *E.g.*, Auto repair shops (Ch.156-1 *et seq.*); Billiard or Pool Rooms (Ch. 104.1-1 *et seq.*); Explosives, Handling of (Ch.125-1 *et seq.*); Housemovers (Ch.138-1 *et seq.*); Itinerant Merchants (Ch. 168-11 *et seq.*); Policemen (special) (Ch.173-1 *et seq.*); Rifle ranges (Ch.170-1 *et seq.*). Other sensitive jobs are regulated but not licensed, such as nurses' aides or orderlies (Ch.136.2-31), while many—such as building inspectors (Ch.41), the defendant commissioner (Ch.21.1), or the Mayor of the City of Chicago—are entirely unregulated.

nance governing public chauffeurs was passed in 1951, the general provisions of Ch.101-5 were enacted by the Chicago City Council in 1972. A short time prior to that date the State of Illinois amended all its licensing provisions to provide that in determining moral character the licensing agency may take into consideration any felony conviction of the applicant, "but such conviction shall not operate as a bar to examination for registration."[39] Thus, it appears that the City of Chicago was following the enlightened lead of the State of Illinois when it enacted Ch.101-5.[40] By contrast, the public chauffeur's ordinance stands out like an anachro-

[39] *See e.g.*, Ill.Rev.Stat. 1975, Ch.10-1/2, §5 (architects).

[40] In a written statement from then-Mayor Daley, February 2, 1972, and reprinted as part of the Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 2nd Sess., January 29, 1972, and entitled *Illinois: The Problems of the Ex-Offender*, Daley rejected the philosophy of Ch.28.1-3, presaging the passage of Ch.101-5. He wrote:

> Chicago has recently undertaken what I believe is a significant new project in the field of offender rehabilitation. Supported by funding from the Law Enforcement Assistance Administration, the Chicago Civil Service Commission, with the support and counsel of the Mayor's Office of Manpower, is establishing a parolee employment program. As you know, most men leave our various penal institutions with only the means to maintain themselves for a short period of time. In addition, present employment practices tend to freeze a parolee out of the labor market. Few firms are willing to hire the ex-convict in any capacity. With its parolee employment program, the City of Chicago hopes to alter significantly the above conditions. The City will hire 100 ex-convicts—both men and women—who will work on a wide variety of jobs, e.g., truck driver, forestry laborer, counselor, or secretary. Support will not be restricted to employment alone. The City will also provide counselors and coaches . . . [and] fringe benefits. . . . [A] participant may enroll in a college or vocational program while he is working.
>
> Perhaps even more significant than the employment and support services themselves is the fact that the City is setting a trend which industry will hopefully follow. Doors previously barred to ex-convicts may open as a result of the policy set by the City of Chicago. *Id.* at 124.

nistic sore thumb: former armed robbers may operate security firms (after 10 years), handle explosives, operate rifle ranges, and be special policemen. But they can not apply to be cab drivers. See notes 37, 38, *supra*.

Chapter 28.1-3 of the public chauffeur's ordinance is a vestige of an archaic mode of thought which unconstitutionally deprives Luther Miller of the equal protection of the laws. The ordinance fails to provide for a sufficiently focused inquiry into Miller's present fitness for licensure, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), even while it provides such an inquiry for other similarly situated persons. The denial, for life, of an individualized determination of fitness for Miller is a denial of process, an exclusion from consideration, which is wholly disproportionate to any real differences which may exist between persons like Miller and others. *James v. Strange*, 407 U.S. 128 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966). The ordinance is therefore arbitrarily over- and under-inclusive. *Jimenez v. Weinberger*, 417 U.S. 628 (1974). As in *James v. Strange, supra*, the provisions of the ordinance embody "elements of punitiveness and discrimination." 407 U.S. at 142. They so exceed the accepted requirements of common non-professional occupations as to make them irrational. *Sugarman v. Dougall*, 413 U.S. 634 (1973). In sum, Mr. Miller's qualifications are to be forever ignored for irrational and discriminatory reasons while others not obviously more or less fit are allowed an opportunity to establish their present fitness for licensure.

B. The Commissioner's Defense of the Ordinance Further Demonstrates Its Irrationality.

The reasons offered by the Commissioner to support the classifications created by the ordinance actually help demonstrate its irrationality. The decisions he relies upon are either irrelevant or entirely consistent with Miller's position that the ordinance is unconstitutional.

The Commissioner has chosen to defend only the narrow distinction between applicants who committed a disabling offense years before and licensees who have just done the same. The former may never be licensed, whereas the latter may retain their license at the discretion of the Commissioner and then the mayor. By limiting his defense to this classification, the Commissioner thereby ignores all of the other irrational classifications which are created by the ordinance.

The Commissioner presents just two arguments as purported justification for the differing treatment of applicants and licensees guilty of the same offense. First, he argues that "licensees in the course of their employment establish a record by which their fitness can be judged." (Petitioner's Brief, at 13). Second, he asserts that the licensee's interest in retaining his license (and thus his job) is sufficiently strong to justify the grant of discretion.[41]

The "track record" argument was addressed and properly rejected by the Court of Appeals.

> The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one

[41] The due-process smokescreen thrown up by the Commissioner is discussed below. See n.44, *infra*.

> who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would according to the ordinance, also be eligible to retain the license, for under Ch.28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation. App., at 20-21.

While the Court of Appeals effectively undercut the track record argument, there are several additional bases for finding both of the Commissioner's arguments inappropriate. First, he ignores the fact that licensees may have no track record or present real interest in a job at all. A license only allows one to apply for private employment as a public chauffeur. Thus, a licensee may hold his license for weeks, months, or even years without ever actually driving a taxi-cab. Similarly, the licensee might be employed for a time as a public chauffeur and then cease that work, while maintaining a current license. In both cases, the licensee's most recent track record will have been made in employment unrelated to being a public chauffeur.[42] In short, such a person's track record is indistinguishable from Luther Miller's and his interest in the license is no more substantial.

Second, even if the convicted licensee has been employed as a public chauffeur, the assumption behind the ex-offender applicant total disability makes one's actual record as a public chauffeur no more relevant than other employment experience, or for that matter, the absence of recent criminal activity. If there is logic behind the ordi-

[42] On the other hand, a license applicant with a disabling criminal offense may come to Chicago, having driven a taxi-cab after his conviction somewhere else for many years. This is a possibility, since almost all major cities do not have a disability like Chicago's. See notes 34-35, *supra*.

nance's assumption that Mr. Miller and others like him are forever unfit, it would purport to be based on an assumption that a person who has committed a certain criminal offense is likely to commit further criminal acts. In the case of one already licensed, a conviction for an otherwise disabling offense should establish that the licensee has recently evidenced character traits that may pose a danger to the public. When the Commissioner evaluates this new fact, the Commissioner has only pre-conviction information from the licensee to examine. On the other hand, the applicant's record includes post-conviction information, which may include a record of both steady employment and crime-free behavior for many years.

Moreover, the track record argument is also totally unresponsive to the concerns expressed in *Roth v. Daley, supra,* that the ordinance is irrational due to making only some crimes, less serious than others, a bar to eligibility. And finally, the track record argument does not explain the ordinance's failure to bar serious vehicle-related offenses.

Respondent does not dispute that the licensed and employed public chauffeur often has a stronger interest in retaining his license than an applicant has in obtaining a license for the first time. So did the citizen at liberty upon the public streets in *Baxstrom v. Herold,* 383 U.S. 107 (1966), often have a stronger interest against subjection to the deprivation of his liberty due to involuntary civil commitment than did the criminal convict who was just completing a prison term. The free citizen was indisputably threatened with job loss, family disruption, and the unfamiliar experience of incarceration in a public institution, whereas the already imprisoned convict would seldom suffer any of these harms. Nevertheless, the Court found that the degree of difference between the two would not support

the *extent* or the *kind* of different treatment that New York visited upon them. And so it is here. The *degree* of difference between an applicant like Miller and an employed licensee simply pales to insignificance in light of the differing treatment accorded the two, given the alleged purpose of the ordinance. Miller may never be considered for licensure, however old his crime or good his character, whereas the licensee's recent crime may be overlooked if his character appears good, on the basis of an immediate and individualized inquiry into fitness.[43] It is the *extent* of this disparity—its disproportionality given an indisputable, but far less significant, difference in the situations of the classes of persons who are treated so drastically differently—that is invidiously *discriminatory.* Cf., *James v. Strange,* 407 U.S. 128 (1972).

Moreover, the *kind* of differing treatment accorded to licensees and to applicants is unrelated to, as well as incommensurate with, the differences in their situations. The differing circumstances might support a differing allocation of the burden of proof of fitness, or a different weighing of elements in the process of evaluating fitness, within a scheme that did evaluate the individual fitness of both licensees and applicants. They will not support an evaluation of the fitness of the one, but a refusal to evaluate the fitness of the other. The Chicago ordinance recognizes the importance of treating the licensee as an individual human being for the purpose of focused inquiry into his actual, personal fitness to do his job. It treats the applicant not as a differently situated person but as an absolute non-person, whose fitness (as well as whose interest in being employed

[43] Mr. Miller has no objection, of course, to the City of Chicago's giving a licensee the opportunity to retain his license, instead of revoking it by a *per se* rule. Nothing in his submission would forbid the City to continue this practice.

as a public chauffeur) is not to be considered at all. Within the class of licensees, some will undoubtedly have a greater interest in retaining their licenses than others. Individual applicants will also differ from each other in the degree of their interest in having a license; and the interest of some will be greater than the interest of some licensees. Here again, the actual, individual interest of each licensee may be considered; but that of the applicant may not. The Court of Appeals was plainly correct in describing these differing treatments as irrational.[44]

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[44] Throughout his brief, the Commissioner purports to discuss the due process rights of licensees as opposed to applicants. Relying principally on *Board of Regents v. Roth*, 408 U.S. 564 (1972), he argues that the former have rights to a hearing whereas the latter do not. He characterizes the ordinance in similar terms: "[T]he line drawn by the ordinance is not between those eligible for the license and those not eligible but rather between those entitled to a hearing and those denied a hearing." Petitioner's Brief, at 15. This legal and factual characterization is simply wrong. Every applicant is entitled to a hearing pursuant to the Code, Ch.101-5 (text at n.27, *supra*), a fact which Commissioner Carter himself argued in *Freitag v. Carter*, 489 F.2d 1377, 1382 (7th Cir. 1973). There is therefore no procedural due process issue before this Court. The distinction beween Miller and all other persons, applicants or licensees, is that regardless of what evidence he presents at the hearing, he is forever barred from licensure by the operation of a *per se* rule, without regard to actual fitness, whereas everyone else sooner or later is eligible and thereafter receives an individualized determination of fitness. In short, the fact Mr. Miller attacks here is his ineligibility for licensure. A statute which allows one group to make a showing under a given standard but applies a different standard to the second group, while giving both a "hearing," obviously raises equal protection questions. *Cf., Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Califano v. Goldfarb*, 97 S.Ct. 1021 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975). All Social Security applicants can get a hearing; the problem in these cases was whether the standard applied to the applications and/or in hearings violated equal protection.

In the face of the irrational results which follow from the terms of the ordinance, the Commissioner now asks this Court to "suppose" that they will not occur because he will not really protect licensees. Petitioner's Brief, at 15-16. Nothing in the record supports making suppositions about how the licensing authority will act or his protestations that he will ignore the thrust of the ordinance.

In support of the arbitrary life-long bar, the Commissioner relies upon *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), which upheld a Massachusetts statute requiring all state police who reach 50 years old to retire from active duty. All parties in *Murgia* agreed that there existed objective evidence (increased risk of cardio-vascular failure) to support the retirement rule. The Court also found that in order to individually evaluate a policeman's continued physical fitness, the state would have been required to conduct a "number of detailed studies." 427 U.S. at 311. In contrast, no objective evidence exists here. To the contrary, the Commissioner admits the decision to impose a life-time exclusion was "arbitrary." Petitioner's Brief, at 26. Furthermore, no additional detailed studies to determine fitness need be conducted by the Commissioner. There is a pre-existing evaluative mechanism. See pp. 52-54, *infra*. Thus, while it may in fact be difficult to "reliably [predict] the rehabilitation of convicted armed felons [sic]," Petitioner's Brief, at 20, the Commissioner already does just that for other offenders.

Actually, a person in Miller's position may be easier to evaluate than other applicants, offenders and non-offenders alike. Luther Miller was convicted twelve years ago, when 20 years old. He has been out of prison for five years. Other applicants could have been released 10 or 20 years ago. Thus Mr. Miller and others like him have established

extensive post-release records in the community, records which may provide far more substantial bases on which to determine character and fitness than the information collected about many other applicants. Since the Commissioner evaluates the character and fitness of all other applicants and licensees, including most ex-offenders, the Commissioner cannot now be heard to say that because the character and fitness of a few ex-offenders is hard to evaluate, he may decide to exclude only them.[45]

Also distinguishing *Murgia* is the fact that the "discrimination" there was very different from that embodied in this Chicago ordinance. In *Murgia* the burden of the statute was applied to all policemen when they became 50. It was merely a condition of continued public employment for a few, select, physically demanding jobs. Nor was the law directed against a vulnerable few. The class injured in *Murgia* was one "each of us will reach if we live out our normal span," 427 U.S. at 313-314, a happening all of us hope will occur. Moreover, as a body politic, we have sought to remove the vestiges of age discrimination from our society, *see e.g.* Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.;* Age Discrimination Act of 1975, 42 U.S.C. §6101 *et seq.*, while making the class of elder citizens the beneficiary of numerous social welfare programs. In contrast, the ordinance here applies to a select indiscriminately chosen few who are denied the opportunity, not to obtain a public job, *Board of Regents v. Roth*, 408 U.S. 564, 574 (1972), but to enter the work force. Second, the law disadvantaging Miller is juxtaposed, not with a general societal commitment to avoid discrimination against the class of ex-offenders to which Miller belongs, but with a pattern of irrational discrimination directed against a discrete and insular minority.

[45] Not only does the State of Illinois presumptively consider the rehabilitation of all ex-offenders in license applications (see page 38, *supra*), but some statutory provisions explicitly demand consideration of their rehabilitation. *E.g.*, Ill.Rev.Stat., Ch. 41, §72h-9 (1975) (Dentists).

The Commissioner also looks to *DeVeau v. Braisted*, 363 U.S. 144 (1960), but it is difficult to visualize a law conceived with greater focus into fitness than the one in *DeVeau*, which prohibited ex-felons from becoming officers of a waterfront union.[46] The Court found that there was a direct relationship between the law's prohibition and its purpose—removing corruption from the waterfront. Senate investigations studying waterfront conditions had established that:

> . . . gambling, the narcotics traffic, loansharking, shortganging, payroll 'phantoms,' the 'shakedown' in all its forms—and the brutal ultimate of murder—have flourished, often virtually unchecked [in the unions]. 363 U.S. at 158.

The investigations further found that these same unions were controlled by criminals with long records, and that:

> . . . No positions on the waterfront were more conducive to its criminal past than those of union officials, and none, if left unregulated, were felt to be more able to impede the waterfront's reform. 363 U.S. at 158.

The law was sustained in *DeVeau*, but only in view of the investigations which substantiated the need for the legislation:

> New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contrib-

[46] The exclusion contained in the law was not as all-encompassing as here, since the bar would be removed in the event of "a favorable exercise of executive discretion." 363 U.S. at 159.

uting factor to the corrupt waterfront situation."[47] 363 U.S. at 159, 160.

By way of contrast, the Commissioner has never come forward with any showing establishing the need for his more repressive rule. Instead he mildly concedes the City Council's "somewhat arbitrary decision." Petitioner's Brief, at 26. *DeVeau* sanctioned barring ex-felons from holding office in unions rife with corruption; Luther Miller merely wishes to demonstrate his fitness to be a public chauffeur.[48]

The Commissioner's reliance upon *Marshall v. United States*, 414 U.S. 417 (1974) and *Dixon v. Love*, 97 S.Ct. 1723 (1977), is similarly inapposite. The *Marshall* Court refused to order the government to spend monies from the treasury to place three-time drug offenders (as opposed to two-time offenders) in rehabilitation programs. It is therefore consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Dandridge v. Williams*, 397 U.S. 471 (1970), and other decisions

[47] In *Pordum v. Board of Regents of State of New York*, 491 F.2d 1281 (2nd Cir. 1974), the Second Circuit reconciled *Schware* and *DeVeau* as follows:

> Where no . . . legislative finding is present, exclusion from a profession can be justified only after a detailed and particularized consideration of the relationship between the person involved and the purpose of the exclusion. 491 F.2d at 1287 n.14.

[48] Although not discussed by the Commissioner, *Hawker v. New York*, 170 U.S. 189 (1898), and *Barsky v. Board of Regents*, 347 U.S. 442 (1954), are consistent with *DeVeau* and the requirements of *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). Both involve professionals, justifying higher demands for licensure. Hawker's conviction was for performing an illegal abortion, obviously directly related to his fitness to remain a doctor. Barsky, also a doctor, had his license suspended for a non-medical reason, *see* Frankfurter, J., dissenting, 347 U.S. at 470, but the suspension was only for six months, and followed a finding of criminal contempt. *See also Dent v. State of West Virginia*, 129 U.S. 114 (1889).

which have refused to require the expenditure of additional public funds on persons outside of the benefited class. *Marshall* is further distinguishable because the persons excluded from that program were multiple offenders with at least one presently outstanding conviction and all of the uncertainties of future rehabilitation, rather than, as in the case of Luther Miller, a person with one ancient conviction, seeking the right to demonstrate a record of post-conviction responsible citizenship.

Dixon v. Love, 97 S.Ct. 1723 (1977), not only required individualized determinations—"[t]he only question is one of timing," 97 S.Ct. at 1727—but the disability imposed was the result of a sufficiently focused inquiry into fitness. The correlation between three driver's license suspensions (nine convictions for violating the Motor Vehicle Code) and fitness to drive an automobile is patent. Moreover, the rule in *Dixon* was sanctioned as one promoting fairness in the system:

> The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers. 97 S.Ct. at 1729.

In contrast, it is not the ordinance at issue here, but the Illinois Criminal Code which puts citizens on notice as to what constitutes acceptable behavior. It is the clear penalties of the criminal code which promote fairness and equality of application. The ordinance, on the other hand, sanctions unfairness by licensing some but not others similarly situated, and ultimately by refusing to grant persons who long ago "paid their debt to society" the right to ever establish their own good character and fitness.

In summary, the underlying premise of the Commissioner's argument is that since courts traditionally have shown deference to legislative line drawing, this ordinance must be

constitutional. But that argument ignores or tries to paper over the irrationality of the classifications created by the ordinance, as well as decisions invalidating similar schemes. It ignores decisions of this Court which demand a more focused inquiry into the fitness of license applicants than is provided by this ordinance. It further relies upon decisions which, upon analysis, support the conclusion that Ch.28.1-3 is unconstitutional. The public chauffeur's ordinance denies Luther Miller the equal protection of the laws by its provision forever prohibiting his licensure.

III. The Categorical Exclusion Of Certain Ex-Offenders From Licensure Based On An Irrebuttable Presumption Of Unfitness Violates The Due Process Clause Of The Fourteenth Amendment.

That portion of Chapter 28.1-3 which is here being challenged simply bans from licensure for life any applicant who has ever been convicted of certain crimes. In so doing, the ordinance embodies in law the irrebuttable presumption, both conclusive and permanent, based on past acts, that such persons are unfit to secure public chauffeur licenses to drive cabs, ambulances or buses. It leaves no room for consideration of the age of the person when the crime was committed, rehabilitation since the commission of the crime, the nature of the crime, the time elapsed since the crime occurred, evidence of changes in the person's character, the person's efforts at improvement, the person's attitudes regarding his past error, or any other relevant information which might suggest that the applicant is a safe licensee. In short, the ordinance is unconstitutional for reasons substantially similar to those relied upon in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); and *Stanley v. Illinois*, 405 U.S. 645 (1972)—it denies the applicant the right to present evidence

as to his present fitness for a license. Moreover, it denies that right for life. In lieu of an opportunity for individualized assessment offered to all others, the categorical exclusion operates as an absolute and permanent presumption of unfitness, immutable and inflexible.

The presumption of unfitness embodied in the public chauffeur's ordinance is similar in many respects to the law struck down in *Stanley v. Illinois*, 405 U.S. 645 (1972). *Stanley* declared unconstitutional an Illinois law providing that unwed fathers were conclusively presumed to be unfit parents. The Court reasoned:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. 405 U.S. at 654-5.

Similarly, here it may be that some ex-offenders are not fit to be licensed as public chauffeurs. It is clear, however, that some, including Miller, may be fit licensees. Nonetheless, the law prohibits their licensure, presuming instead their immutable unfitness.[49]

The State defended the law in *Stanley* as based on administrative convenience. 405 U.S. at 656. Recognizing the State's valid interest in protecting the child, this Court said:

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[49] Frankfurter, J., concurring in *Schware v. Board of Bar Examiners, supra*, at 251, presaged the analysis contained herein, when he stated:

> But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who entertained them (and joined the Communist Party) and who later undoubtedly came to their senses and their sense of responsibility "questionable characters."

> We are not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve those ends are constitutionally defensible. 405 U.S. at 652.

The lifetime bar to licensure of certain ex-offenders is not justified as an end in itself here, either. The Commissioner writes that the "somewhat arbitrary" ordinance, Petitioner's Brief, at 26, is justified because of the difficulties inherent in evaluating rehabilitation in order to establish fitness. Petitioner's Brief, at 20. Thus, as in *Stanley*, the issue before this Court is the means chosen by the City of Chicago, not its ultimate goal of protecting the public safety.

In this case, the means chosen by the city are both conclusive and lifelong. At the same time, the Commissioner does have a comprehensive system for evaluating the present fitness for licensure of all other ex-offenders, an evaluative process which weighs and analyzes the applicants' and licensees' employment histories, character references, reputations, and abilities to perform as public chauffeurs prior to issuing or denying or terminating a license.

This Court has been particularly careful in scrutinizing exclusions in situations where the government has such a pre-existing, broadly applied evaluative mechanism which is already measuring or focusing on the same factors which theoretically underpin the exclusionary bar. Thus, in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Social Security Administration already was measuring dependence for illegitimate children born before the father's disability. It was irrational to exclude the limited group of after-born illegitimate children from this pre-existing, broadly applied evaluative scheme already measuring dependence and the validity of the claimed paternity. *See also Baxstrom v. Herold*, 383 U.S. 107 (1966) (prisoners excluded from pre-existing, broadly applied, commitment mechanism); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

These cases are in contrast to those where there was no pre-existing mechanism which focused on the same factors underpinning the absolute barrier to entitlement. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Social Security Administration was not already 'in the business' of evaluating the validity of marriages—"the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage. . . ." 422 U.S. at 772.[50] Similarly, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the state had no pre-existing mechanism to determine whether particular opticians had the ability to prescribe lenses. *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). In such situations, the government, seeking to avoid the need to establish complete new systems to evaluate eligibility or fitness, properly drew straight lines to establish the result.

Here, the City of Chicago has itself chosen to establish elaborate systems to evaluate the eligibility or fitness of most applicants, including consideration of past conduct.

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[50] *Weinberger v. Salfi*, 422 U.S. 749 (1975), sustained a challenge to a Social Security provision which presumed that all marriages entered into less than nine months prior to the death of a beneficiary were fraudulently conceived. The decision in *Salfi* is premised upon the administrative needs of a massive social welfare agency. Thus, the Court found that the prophylactic rule: (1) saved agency resources, and (2) protected other potential recipients, who satisfied the rule, from the "uncertainties and delays of administrative inquiry into the circumstances of their marriage", 422 U.S. at 782; that (3) it would be difficult to determine if a marriage was in fact a sham; and (4) granting exceptions to the rule might well encourage the evil sought to be avoided. 422 U.S. at 782-3.

When, at the same time, Miller and other applicants are absolutely excluded from the evaluative mechanism, even though their evaluation would be based on the same type of criteria applied to all others, the system should be carefully scrutinized.

The ordinance here cannot withstand the scrutiny properly applied to such irrebuttable presumptions of unfitness. The rule barring Miller's licensure is not narrowly drawn. *Cleveland Board of Education v. LaFleur*, 414 U.S. at 632, 647 n.13 (1974). The lifetime prohibition could not be broader. Nor would an individualized evaluation of Miller burden the public treasury; not only does the Commissioner evaluate all other ex-offenders, but he is authorized to, and does, charge a license fee to cover those costs. *Gibbons v. City of Chicago*, 34 Ill.2d 102, 214 N.E.2d 740 (1966). In sum, adequate alternative means, *Vlandis v. Kline*, 412 U.S. 441, 451 (1973), exist to avoid the irrebuttable life-time presumption of unfitness imposed upon Miller.[51]

The impropriety of a bar which is both conclusive and permanent is heightened where it is imposed by the government as a barrier to access to a large field of private employment. This Court has long recognized that employment, and particularly the right to engage in the common occupations of life, is a basic human liberty. *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinder-*

[51] Judge Campbell, in his concurring opinion, addressed this issue, concluding that: "[T]he hearing procedure . . . offers a reasonable and practical means of establishing the pertinent facts on which the City's objective is premised." App., at 44.

mann, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Truax v. Raich*, 239 U.S. 33 (1915); *Smith v. Texas*, 233 U.S. 630 (1914). For that reason, the Court has carefully scrutinized absolute barriers erected to prohibit a small group of persons' entry into the employment market. Thus *Schware, supra*, insisted that qualification for licensure follow a focused inquiry into an applicant's present fitness for licensure. Similarly, *Sugarman, supra*, which considered "whether New York's flat statutory prohibition against the employment of aliens in the competitive civil service is constitutionally valid," 413 U.S. at 639, while specifically reserving for the state the right to hire or fire any person for "whatever legitimate reason," *Id.*, concluded that the "breadth and imprecision" of the law violated the Constitution. *Id.*

Four Courts of Appeals have followed this Court's lead and disapproved of irrebuttable presumptions of unfitness which operate to preclude entry into, or retention in, employment. *Gurmankin v. Constanzo*, Nos. 76-1730, 76-2297, and 77-1273 (3rd Cir. April 25, 1977); *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975); *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976); *Crawford v. Cushman*, 531 F.2d 1114 (2nd Cir. 1976); *Pordum v. Board of Regents of the State of New York*, 491 F.2d 1281 (2nd Cir. 1974). Thus, in *Gurmankin*, a blind prospective teacher challenged a rule prohibiting her from taking a qualifying examination because blind teachers were not permitted to teach sighted students. Relying upon *Cleveland Board of Edu-*

cation v. LaFleur, 414 U.S. 632 (1974), the Third Circuit Court of Appeals held the rule unconstitutionallly deprived Gurmankin of the opportunity to present evidence of her competency.

> The refusal by the District to permit her to take the examination violated due process by subjecting Ms. Gurmankin to an irrebuttable presumption that her blindness made her incompetent to teach sighted students.

Similarly in *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976), the Fifth Circuit Court of Appeals declared unconstitutional a school district rule prohibiting the employment of parents of illegitimate children. The school district defended its rule by insisting that unwed parenthood is *prima facie* proof of immorality. In order to evaluate this claim of unfitness, the court adopted the principles established in *LaFleur*, *Vlandis*, and *Stanley:*

> The law is clear that due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact. Thus, unless the presumed fact here, present immorality, necessarily follows from the proven fact, unwed parenthood, the conclusiveness inherent in the . . . rule must be held to violate due process.[52] 507 F.2d at 614-15.

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[52] The court noted that "if a state investigates the moral character of an individual upon whom it intends to either bestow a benefit or impose a burden, due process requires that such inquiry look to *present* moral character," (original emphasis), citing *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). 507 F.2d at 614n.6.

Finding that "the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth," 507 F.2d at 615, the court held that the conclusive presumption therein violated due process.

The public chauffeur's ordinance, Ch.28.1-3, is based upon an irrebuttable presumption of unfitness. By forever precluding his licensure, it in effect presumes that Mr. Miller is forever unfit for licensure. It does so even though a regularly established procedure has been established by the Commissioner to evaluate the fitness of almost all other ex-offender applicants. Thus, and especially in light of the fact that the ordinance precludes Luther Miller from one of society's most important rights, the opportunity to work, Ch.28.1-3 violates Miller's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated, Respondent respectfully requests that this Court affirm the judgment of the Court of Appeals below. Alternatively, should this Court not affirm the judgment, Respondent respectfully requests that this cause be vacated and remanded to the Court of Appeals to consider the issues herein in light of a decision of an Illinois Appellate Court invalidating the same provisions of the Municipal Code of Chicago addressed herein. Note 25, *supra*, and accompanying text.

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